No. 89-1245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all partners, both general and limited, and in the right and on behalf of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

Petitioner,

– against –

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B.F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK – APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF OF RESPONDENTS ROBERT J. REED, SIDNEY HACKELL, FIRST NATIONAL CITY BANK, WILLIAM B.F. WERNER, MID-ISLAND HOSPITAL, DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.

ROBERT W. CORCORAN
LYNN, LEDWITH & CORCORAN
Attorneys for Respondents
Robert J. Reed, Sidney Hackell, First National City Bank, William B.F. Werner, Mid-Island Hospital, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate & Management Co., Simon Cohen Realty Co. and Aljer Realty Co.
200 Garden City Plaza
Garden City, New York 11530
(516) 742-6200

QUESTIONS PRESENTED

1. Did petitioner preserve in the state court the federal issue of due process here sought to be reviewed?

2. Where a court finds that the representative plaintiff's opposition to settlement of a derivative action brought in the name of the partnership is motivated by personal considerations outside the scope of the action and affords notice and an opportunity to be heard on the settlement to all partners, does due process prohibit the court from approving the settlement over the sole objection of the representative plaintiff?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT COHEN, individually and as a Partner of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO. suing on behalf of himself and all partners, both general and limited, and in the right and on behalf of SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO., SIMON COHEN COMPANY and ALJER REALTY CO.,

Petitioner,

– against –

ROBERT J. REED, SIDNEY HACKELL, BEATRICE POTTER and the FIRST NATIONAL CITY BANK, individually and as Executors of the Last Will and Testament of SIMON COHEN, deceased, WILLIAM B.F. WERNER, individually and doing business as MID-ISLAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK, J.S.K. CLEANING SERVICES, INC., JUDAH FEINERMAN, JASDANE, INC., SHELDON KATZ, VOLUME FEEDING, INC., DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK – APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF OF RESPONDENTS ROBERT J. REED, SIDNEY HACKELL, FIRST NATIONAL CITY BANK, WILLIAM B.F. WERNER, MID-ISLAND HOSPITAL, DADGAB, INC., BRIMSCO, INC., SIMON COHEN REAL ESTATE & MANAGEMENT CO., SIMON COHEN REALTY CO. and ALJER REALTY CO.

INTRODUCTION

Respondents Robert J. Reed, Sidney Hackell, and Citibank N.A. (formerly First National City Bank), individually and as Executors of the Last Will and Testament of Simon Cohen deceased, William B.F. Werner, individually and doing business as Mid-Island Hospital, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate & Management Co., Simon Cohen Realty Co. and Aljer Realty Co., oppose the petitioner's application for a Writ of Certiorari herein on the following grounds:

1. The petitioner did not, as required by 28 U.S.C. 1257, specifically set up or claim in the state court the right which he now seeks to have this Court enforce. This Court therefore lacks jurisdiction under 28 U.S.C. § 1257.

2. Although petitioner does, in his "Statement of the Case" (pp. 7-8 of Petition), indicate the stage in the proceedings below at which the question of "due process" was raised, he has not indicated where in those proceedings any *federal* due process issue was identified, nor has he specified the manner in which any such issue was passed upon by the state court.

3. Neither the Surrogate's Court nor the Appellate Division addressed the due process issue petitioner now presents. Hence, even had petitioner adequately raised the issue in the courts below, there would be no reason for this Court to grant the writ to review an implicit decision that can have no influence on other courts.

4. Petitioner does not cite a single decision, state or federal, that conflicts with the holding of the Appellate Division that in appropriate circumstances a court may approve the settlement of a derivative or class action without the consent of the representative plaintiff. While, as the Appellate Division unanimously held, the Surrogate's Court was clearly justified in

doing so here, that factbound question does not merit this Court's review.

5. The decree which was rendered in the court of first instance, following some thirteen years of intensive discovery and intermediate litigation, including fifty-five days of trial, accorded to petitioner both substantive and procedural due process. The record of the state action shows no evidence of fundamental unfairness to petitioner.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" (pp. 3-11, Petition herein), claiming that he has been deprived of procedural due process is disputed by respondents as inaccurate, unjustified, and unsupported by any record citations.

Simon Cohen died on November 25, 1970, leaving a Last Will and Testament in which he named the defendants herein Reed, Hackell, Citibank and Beatrice Potter (now deceased) as executors of his Last Will and Testament. The decedent left the bulk of his approximately nine million dollar estate to his surviving spouse and two daughters, bequeathing to his son, the petitioner herein, in trust, a single parcel of realty in New Jersey.

In the course of the litigation below, petitioner admitted to the trial surrogate that the decedent stopped talking to him about business affairs approximately two years before his death. The strained relationship between them is demonstrated by a letter which the petitioner wrote to the decedent approximately three months before the latter's death, complaining about his being "dealt out of" his father's affairs. In that letter he stated (SA1-2):*

---

* Numbers in parenthesis preceded by "A" refer to the Appendix in this Court. Those preceded by "SA" refer to the Supplemental Appendix in this Court. Those preceded by "RB" refer to the Record in the State Appellate Division. Those preceded by "SRB" refer to the Supplemental Record in said Appellate Court.

> "I do hope you will recognize the fallacy of forcing me into a position where I must later perform the unwanted role of having to harass your nominees and delay timely attention to matters on account of information which can so much more easily be transmitted now."

Nine months after his father's death, petitioner commenced this action, accusing his father of multiple acts of fraud and deception against Simon Cohen Realty and Management Company (SCREAM) Simon Cohen Realty Company (SCR) Simon Cohen Company (SCC), and Aljer Realty Co (ALJER). Three years later he amended his complaint, expanding it to seventeen causes of action, and naming additional defendants.

The extent and magnitude of the litigation, during the period from its institution in 1971 to the final decision of the trial court on November 27, 1984, is demonstrated, to a small degree, by the enumeration of the two hundred and fifty eight decisions, orders and decrees rendered and entered in the intervening period (A314-366).

That extended enumeration does not, however, even begin to suggest the additional time, energy and effort expended by the parties and courts in the course of argument of motions, conduct and supervision of depositions, and in the various conferences which were held before different officers of the court below. It does not, for example, reflect that fact: (a) that pretrial examinations utilized by the parties from 1972 through 1978 took place on sixty different days, consumed some five thousand four hundred and seventy one pages of transcript, and saw six hundred and forty seven exhibits marked for identification; (b) that all of the foregoing pretrial examinations took place at the Surrogate's Court in the Nassau County; that on many occasions portions of those examinations were supervised by and subject to the rulings of the Surrogate who is the object of the petitioner's criticism herein, and who was then Chief Law Assistant or Chief Clerk; (c) that on May 22, 1975 the decision of the then Surrogate, the Honorable James Bennett, denying certain motions of the defendants to dismiss the tenth cause of action, followed

the receipt of some three hundred and fifty three pages of testimony at a hearing which was held on February 25th and 26th, 1975; and (d) that the present surrogate, as referee, received the defendants' motion for summary judgment and the voluminous papers which were submitted in support of and in opposition to that motion; that he presided at a hearing on May 15, 1979, which, consuming three hundred and fifty six pages of transcript, explored fully the then known factual and legal matters relevant to that motion; and that after full consideration he submitted an extensive referee's report which was eventually approved by the then surrogate Bennett (RB754-1254).

On March 4, 1980, Trial of the subject action commenced before the Honorable C. Raymond Radigan, as referee to hear and report (SA3-5), and was continued on fifty-five non-consecutive days. It produced a transcript of five thousand five hundred and six pages, and saw the introduction of three hundred and fifty separately numbered exhibits, many of which consisted of multiple documents and pages. On the next to the last day of trial, Steven Hochhauser, then attorney for Petitioner, told the court that he had substantially completed his case. He stated to the Court (SA6-7):

> "The only thing remaining, your Honor, is the productions (sic) and few other last other items that don't require witnesses."

When the trial reconvened on October 22, 1981, there was discussion about the production of certain papers and records that had been requested by plaintiff. The presiding Surrogate Radigan stated that the trial had proceeded to a point where both sides had a sufficient basis for assessing their chances, and he would not announce a schedule for resumption of trial or motions until he was advised that settlement was not achievable (SA10).

Settlement negotiations which had begun during the trial were then actively pursued by petitioner and his counsel, the defendants and their counsel, and the guardian *ad litem* in the case,

Morris Rochman. Negotiations resulted in an offer by the defendants which was found, by plaintiff's counsel, to be acceptable and in the best interest of the partnerships, but which was rejected by the plaintiff himself. After the trial was adjourned, plaintiff declined even to consider settlement without first receiving a second opinion from separate counsel with respect thereto. According to Mr. Hochhauser, the petitioners' insistence on such a second opinion was the sole cause of delay in resolving the case, or in resuming the trial (SA10-11).

The record shows that Hochhauser was eventually discharged by petitioner because of his approval of the defendants' settlement proposal. Petitioner moved for removal of Hochhauser as his counsel, and the replacement of him by his present counsel (SA12-14). In response, Hochhauser sought instructions from the Court as to whether or not he should continue to represent the interests of the other limited partners on whose behalf the petitioner had sued derivatively, and asserted that it was his opinion that the proposed offer of settlement "is of enormous value to the partnerships, the family of Simon Cohen, the non-family limited partners and to the Plaintiff himself" (SA17-18). The petitioners objections thereto, according to Hochhauser, were based upon personal considerations rather than the best interests of the parties he represented.

Hochhauser's April 21, 1972 affidavit states, in pertinent part:

> "28. I find myself precisely in the posture envisioned by Judge Goldberg in the Pettway case. An offer of settlement has been proposed, which in my opinion, is of enormous value to the partnerships, the family of Simon Cohen, and non-family limited partners and to the plaintiff himself. The plaintiff wants to gamble to obtain more. He has the financial capacity to continue to litigate for another ten years, but the other members of his family and the other limited partners may not be so situated. Indeed, the *more* which he seeks is motivated by personal considerations rather than by a desire to do what is in the best interest of the group he purports to represent." (SA16-18)

It is clear from the foregoing that petitioner's then counsel approved the proposed settlement, and that petitioner sought to avoid the impact of that approval by dismissing him and seeking new counsel who would more readily do petitioner's bidding, thus permitting him to argue that the trial court settlement had neither his approval nor that of his attorney.

In August of 1982 the surrogate determined that the non-party limited partners would be apprised (1) of the status of settlement negotiations and of the defendants' offer; (2) of the pending application for substitution of attorneys; and (3) of the question raised by Hochhauser about whether plaintiff could fairly and adequately represent the interest of the limited partners and the four partnerships (A148). Plaintiff was directed to mail to the partners a notice of hearing to be held on those subjects on October 4, 1982 (A169).

In a Notice of Settlement Offer dated January 13, 1983 (A192), the surrogate carefully reviewed for the limited partners the background of the litigation and directed that his notice, together with a copy of the defendants' offer of settlement be sent to those limited partners. The limited partners were directed to advise the Court in writing, on or before February 16, 1983, of their views, if any, on the proposed settlement (A203).

In a decision dated April 6, 1983 the Court analyzed the responses of the limited partners and noted that a settlement may be imposed on the representative plaintiff if found to be in the best interest of the partnerships (A248-260). The analysis of the responses showed the following: (a) with respect to SCREAM: (1) only 21.5 units, or 10.75% (including a petitioner) objected to the settlement; (2) 155.5 units, or 82.75% (including the defendants), approved or did not object to the settlement; (3) ownership of 13 units or 6.5% was in dispute, and accordingly, those units were deemed neutral for the purpose of the analysis; (b) with respect to SCR: only the plaintiff, who owns 5.4% of the units, objected; the remaining partners who hold 94.6% of the units approved the settlement or did not object to it; (c) with respect to SCC and AlJER: (1) three parties responded, two whom accepted unconditionally, and one of

whom accepted, but suggested three changes that were later adopted; (2) no partner other than plaintiff, who holds only 3.3% of the units, objected to the settlement; thus 96.7% approved or did not object.

Having thus analyzed the partners responses to the proposed settlement, the Court directed that a hearing be held on May 24, 1983 to afford to the petitioner and any objecting partners an opportunity to show cause why the proposed settlement should not be approved (A257). A copy of the decision was directed to be mailed to each partner (A259).

At the May 24, 1983 hearing, only the petitioner appeared to oppose the settlement (A291-292). Petitioner submitted and affidavit detailing his objection to the proposed settlement. His opposition was later supplemented by the June 1, 1983 affirmation of his attorney, Michael Schoeman.

On June 22, 1983, the Court stated that it had determined (A265):

> "That it would be in the best interest of all of the partners to give the defendants an opportunity to adopt the three [additional] conditions [which had been specified by the some of the partners]."

On April 27, 1984 the Court issued a decision analyzing the settlement proposal in the light of the claims made, appellants likelihood of success, and the best interest of the partnerships (A286-303). The Court concluded that settlement of the action would be in the best interest of the partnership (A300), stating (A293):

> "* * * The overwhelming majority of the partners who responded favored the settlement and they represented a substantial percentage of the respective partnership interests, far outweighing the interests of the objectors, including the individual interest of the representative plaintiff."

The April 27 decision was the predicate of the Court's November 27, 1984 decree settling and discontinuing with prejudice the derivative claims in the amended complaint.

The petitioner's January 31, 1984 motion for a new trial was denied by the Surrogate on the ground that it had been rendered moot by the decision of April 27, 1984.

In its decision of May 5, 1986, the Appellate Division of the New York State Supreme Court reviewed the proceedings before the Surrogate and, finding them to fully comport with appropriate state procedure, affirmed the Surrogate's actions, stating:

> "[W]here it is apparent that no meaningful settlement negotiations are being conducted, due in large part to the representative plaintiff's unwillingness to make certain concessions, and the court receives a settlement proposal it considers to be adequate, the court is not without authority to present the offer to the class of people being represented for their approval or disapproval, provided the notice sent to the class is fair and impartial, and does not indicate the court's views on the proposal. If the responses received from the members of that class are sufficiently favorable, the court may then consider the proposal for its approval, and hold a hearing on the fairness, reasonableness and adequacy of the same. In this case, this procedure was followed." (A-vii - A-viii)

It is submitted that the foregoing summary of the case illustrates clearly that procedures made available to petitioner by the State Court were more than fair and adequate to accord to him due process in all regards.

Although hardly relevant on the present application, plaintiff's use of conclusory and defamatory terms against respondent require some comment, lest silence be taken for acquiescence.

On this application, petitioner (pp 4-5 of Petition) accuses his deceased father of having siphoned off profits from the tenant hospital by awarding to his "cronies" various service contracts, and allegedly reducing the income to the landlord SCREAM; that the hospital was "over charged" on those contracts; and, that the profits therefrom were diverted from the hospital and siphoned off to benefit Simon Cohen. It is significant to note the lack of any citational support for such accusation. The fact is that the record of the fifty-five day trial is devoid of any evidence intending to indicate that the hospital ever paid more than fair market value for the services rendered to it under any of the criticized contracts. The fact is, too, that the decedent, Simon Cohen, was the architect of the entire financial and commercial structure whereby the hospital and the various limited partnerships involved in this action became related, and that there is not one person, including petitioner, who did not acquire his interest in the partnership through and because of his relationship of blood or friendship with the decedent. With lack of proof or evidence to maintain his charges, petitioner has been forced to use, in a derogatory fashion, terms such as "cronies", "diversion", "siphoning". The use of such language, however, does not obscure petitioner's failure, in his long, extensive and debilitating litigation, to show that the hospital or the partnership lost one penny because of the various contracts referred to. Although it is true, as alleged by petitioner, that his father had borrowed money from the various entities named, it was not shown during the trial or the preceding discovery procedures, by testimony or other evidence, that this borrowing was in any way disapproved by any of the various partners of Simon Cohen. It is also significant that in the thirteen years of litigation petitioner received no active support from any of the other partners.

POINT I

PETITIONER DID NOT PRESENT TO THE STATE COURT, FOR CONSIDERATION OR DETERMINATION, ANY FEDERAL QUESTION, CONSTITUTIONAL OR OTHERWISE, AND THUS HAS NOT DEMONSTRATED ANY BASIS FOR CONCLUDING THAT THIS COURT HAS JURISDICTION TO CONSIDER, ON THIS APPLICATION, HIS FOURTEENTH AMENDMENT CLAIM.

28 U.S.C. 1257, under which petitioner expressly makes the pending application for a Writ of Certiorari, expressly provides, *inter alia*, that the final judgments or decrees rendered by the highest state court in which decision may be had, may be reviewed by this Court by Writ of Certiorari, where "any title, right, privilege or immunity is specially setup or claimed under the Constitution or the treaties or the statues of *** the United States." The proper presentation and preservation of the federal claim in the state court has been held to be jurisdictional, and this Court has repeatedly refused to entertain proffered federal questions where the issue was not presented to and decided in the state court. *Webb* v. *Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981); *Exxon* v. *Eagerton*, 462 U.S. 176, 103 S.Ct. 2296 (1983); *Michigan* v. *Tyler*, 436 U.S. 499, 98 S.Ct. 1942 (1978); *Hill* v. *California*, 401 U.S. 797, 91 S.Ct. 1106 (1971); *Monks* v. *New Jersey*, 398 U.S. 71, 90 S.Ct. 1563 (1970).

Although petitioner does, in his "Statement of the Case" (pp. 7-8 of Petition), indicate the stage in the proceedings below at which the question of "due process" was allegedly raised, he has not indicated where in those proceedings any *federal* due process issue was identified. Nor has he specified the manner in which any such issue was passed upon by the court.

The record herein shows indisputably that no federal question was presented to the state court for resolution. In the Appellate Division, Second Judicial Department, to which petitioner here seeks the issuance of a Writ of Certiorari, his brief

(pp.vii-ix thereof) presented eight specific questions for consideration, all of which challenge the propriety of the discretion which had been exercised by the trial court, and none of which raised any federal issue (SA20-22).

The "Point Headings" utilized by the petitioner to summarize his arguments in that Court were consistent with his formulation of the "Questions Presented", and again did not expressly or impliedly raise a federal question (SA23-24).

In attempting to satisfy this Court's requirement [Rule 21.1(h)] that a petitioner's statement of the case shall specify the stage in the state proceedings at which reviewable federal questions were raised, petitioner here (pp.7-8 of Petition) has specified three such stages:

(a) in connection with his motion to the trial court for a new trial, and specifically in his affidavit in support thereof;

(b) in his appellate division brief, pp 38-41; and

(c) at pages 11 and 12 of his affidavit in support of his fourth application for leave to appeal to the state Court of Appeals.

To the extent that petitioner raised a due process issue in the Surrogate's Court, his own Petition makes clear that he did so only in the context of his motion for a new trial. As the Surrogate held, that motion was rendered moot by the Settlement Decree, and in any event petitioner does not seek review of the disposition of that motion here. Having failed to raise the relevant issue in the Surrogate's Court, he could not properly have raised it in the Appellate Division, and indeed that court addressed no such issue. In any event, petitioner nowhere presented a *federal* constitutional issue to the state courts below and they did not decide any.

a. PETITIONER'S MOTION FOR A NEW TRIAL

Petitioner's motion for a new trial was denied by the trial court, because that motion had been rendered moot by the court's decision settling the action (A304-305). As indicated above, Petitioner did not, in the Appellate Division, refer to any constitutional issue in either his formulation of the questions presented to the court for determination, nor in the summary of his arguments implicit in the "Point Headings" set forth in his brief. While Petitioner did, under Point VII of his Appellate Division Brief, use the words "due process" in arguing that he had been deprived of a "speedy trial" in this civil matter, he did not do so in any federal context; he cited neither the Federal Constitution nor any federal decisions; and he argued the point on the basis of the state practice statute and state cases decided thereunder. Thus, even if petitioner be deemed to have raised a "due process" issue, it was not raised expressly or impliedly as a *federal* question, and could just as readily have been addressed to a possible violation of the Constitution of the State of New York [Article 1, Section 6 (SA29)].

In *Webb* v. *Webb*, *supra*, 451 U.S. at 493, this Court was faced with a similarly deficient petition in which the petitioner struggled to find language in the state court record to support a claimed federal constitutional issue. There, the words "full faith and credit" were used in the courts below. This Court, in holding that "it is far more likely that petitioner was referring to state law", rejected jurisdiction, stating, among other things (p. 496):

> "Although petitioner did use the phrase 'full faith and credit' at several points in the proceeding below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution.***"
>
> ***
>
> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court

> can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system ***. Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. *** We are unpersuaded. In fact, we find it far more likely that petitioner was referring to state law."

Here, a reading of the decision of the Appellate Division of the State Court (A-i) shows no reference to or consideration of any federal statutory or constitutional issue. The absence of any such reference supports our contention that no such issue was considered or decided by that Court. We therefore rely upon the established holding of this Court that when "the highest state court has failed to pass on a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court can affirmatively show the contrary". *Street* v. *New York*, 394 U.S. 576, 582 (1968); *Bailey* v. *Anderson*, 326 U.S. 203, 206-207; *Webb* v. *Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981).

b. PETITIONER'S APPELLATE DIVISION BRIEF.

Contrary to petitioner's statement (p.7 of his Petition) that he raised at pp.38-41 of his Appellate Division Brief a due process claim, no such issue, either federal or state was there raised. As the matter quoted to this Court by petitioner indicates, his Brief, at the pages cited, was solely concerned with his argument that the trial court had no power, in a derivative action, to impose a settlement without the consent of the representative plaintiff or his counsel. While petitioner did, at a later stage in the argument on this point, allege that such imposition violated his due process rights, the argument was not raised as a federal question, he cited no federal cases dealing with it, and the issue could just as readily been addressed to the State Constitution (Art. I, Section 6). It is submitted that in this claimed instance, as in the matter of petitioner's alleged raising of the

issue of due process with respect to a speedy trial, the presumption should be, as held in *Webb* v. *Webb*, *supra*, that reference was to a state constitutional issue.

Lastly, under this point, a reading of the decision and order of the Appellate Division (Ai-xiv) shows no reference to, consideration or decision of any due process question, thus calling for the assumption that the omission was due to a want of proper presentation. *Street* v. *New York*, *supra*; *Bailey* v. *Anderson*, *supra*; *Webb* v. *Webb*, *supra*.

c. PETITIONER'S FOURTH APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Pages 11-12 of the Schoeman Affidavit (SA26-29), submitted by petitioner in support of his motion seeking leave to appeal from the Appellate Division Order to the state Court of Appeals, did not present any federal question for consideration and determination. In paragraphs "30" and "31" of that affidavit, Mr. Schoeman argued that the Appellate Division "erroneously" relied upon the trial court's solicitation of "consent" of the limited partners to the proposed settlement. He terms "this entirely new procedure" both unwise and a violation of petitioner's "due process" rights, alleging that the principle does not permit the imposing on him, as a sole representative plaintiff, of a settlement that he has not agreed to, and, alleging further, that such procedure deprives him of the right to a fair hearing.

Again here, as in "(a)" and "(b)" above, Mr. Schoeman's affidavit raised no federal issue for consideration, either expressly or by clear implication. Procedural due process was not lacking. On the contrary, the state afforded petitioner almost thirteen years to prove his case, with fifty-five days of actual trial. Having afforded petitioner all that time and opportunity to make his case, the trial court, after reviewing the history of the litigation, and after finding that the "overwhelming majority of he partners who responded favored the settlement" (A293), stated its opinion "that this settlement is in the best interest of the partners ***" (A300).

If perchance there was any possibility of a "due process" issue involved in the trial courts action, it clearly was not raised as a federal question by any of the allegations relied upon by Mr. Schoeman in his affidavit. Moreover, the denial of petitioner's motion for leave to appeal without any reference to the due process question raises the presumption that the issue had not been properly presented. *Street* v. *New York*, *supra*; *Bailey* v. *Anderson*, *supra*; *Webb* v. *Webb*, *supra*.

POINT II

PETITIONER PROVIDES NO REASON FOR THIS COURT TO REVIEW THE DECISION BELOW.

Even were this Court to determine that it had jurisdiction, petitioner provides no reason to grant the writ. Indeed, petitioner does not cite a single decision, state or federal, that conflicts with the holding of the Appellate Division that in appropriate circumstances a court may approve the settlement of a derivative or class action without the consent of the representative plaintiff. The Appellate Divisions's unanimous conclusion that the Surrogate's Court was clearly justified in doing so here is a factbound question not meriting review by this Court.

In any event, the Appellate Division's decision, while not mentioning due process, nonetheless makes plain that due process principles were more than adequately safeguarded here.

If it be assumed, for the purpose of argument only, and with no intention to concede the point, that the petitioner on his present application has raised a federal question of deprivation of due process under the Fourteenth Amendment, he has done so only with respect to procedural due process.

Petitioner, as limited by his petition herein, challenges only the constitutional impropriety of the procedure whereby the state trial court terminated the trial after fifty-five (55) days spent on plaintiff's main case, refused to order a new trial, and directed settlement of the action on specified terms. The dimension of

the due process issue is measured both by petitioner's formulation of the "Questions Presented" in the Appellate Division (SA23-24) and by his "Statement of the Case" (pp. 3-8 of Petition). That formulation and statement show that petitioner complains only because of the alleged novelty of the procedure adopted by the trial judge in disposing of the thirteen (13) year litigation (pp. 7-8 of Petition). Examination of petitioner's brief in the Appellate Division of the State Court, to which he refers this Court (pp. 7 of Petition), shows that he there predicated his due process assertion on counsel's claimed lack of knowledge of any prior case where a class or derivative action was settled without the "actual agreement" of a representative plaintiff or his counsel. In counsel's affidavit, submitted in support of the petitioner's application to the State Court of Appeals for leave to appeal (to which petitioner refers this Court at p. 8 of the petition herein), he complained of the "unwise" reliance upon the Court-solicited "consent" of the limited partners, and complained that "this entirely new procedure violates the due process rights of the representative plaintiff."

It is submitted that petitioner has demonstrated no deprivation of procedural due process. Initially, it should be noted that he acted here as a representative plaintiff in a derivative action, seeking to enforce not his personal rights, but those of the limited partnerships. §115A of New York's Partnership Law (SA30-32), a companion to §626 of New York's Business Corporation Law, statutorily creates a derivative action where none existed at common law, and provides for control thereof by the court. The action is equitable in nature, and any relief granted must be in favor not of the representative plaintiff, but in favor of the beneficiaries thereof. *Papilsky* v. *Berndt*, 333 Fed. Sup. 1084, Aff. 466 Fed. 2d 251, Cert. Denied 409 U.S. 1077, 93 S. Ct. 689 (1971); *Abramowitz* v. *Posner*, 672 Fed. 2d 1025 (1982); *Richland* v. *Crandall*, 259 Fed. Sup. 274 (1966); *Riveria Congress Associates* v. *Yassky*, 268 N.Y.S. 2d 854, 25 App. Div. 291, Aff. 277 N.Y.S. 2d 389, 18 N.Y. 2d 540 (1966).

In asserting that only he, as the plaintiff, was entitled to settle the action, the petitioner here refuses to acknowledge the

fiduciary nature of his position. He also chooses to ignore the history of derivative actions, which show many examples of judicial decisions expressly recognizing the right of the judiciary to control the course of such litigation, and to require settlement against the approval of the named plaintiff. *Saylor* v. *Lindsley*, 456 Fed. 2d 896 (2nd Circuit, 1972); *Denicke* v. *Anglo California Bank*, 141 Fed. 2d 285 (9th Circuit 1944), Cert. denied, 323 U.S. 739; *Bysheim* v. *Meranda*, 44 N.Y.S. 2d 15 (Supreme Court, New York County, 1943); *Beeber* v. *Empire Power Corp.*, 31 N.Y.S. 2d 914 (Supreme Court, New York County, 1941).

As Judge Friendly, speaking for the Second Circuit Court said in *Saylor* v. *Lindley*, *supra* (at pp. 899-900):

> "We are willing to go along with appellees and hold, despite the seeming incongruity, that the assent of the plaintiff (or plaintiffs) who brought a derivative stockholders action is not essential to a settlement; a contrary view would put too much power in a wishful thinker or a spitemonger to thwart a result that is in the best interest of the corporation and its stockholders." (Footnote omitted)

Similarly, in the *Bysheim* case, *supra*, a New York trial court, approving the settlement of a derivative action over the objection of one of the plaintiffs, stated (p. 22):

> "[A derivative plaintiff's position as such] cannot set him up as a dictator with power to compel a continuance of the action against the unanimous consent of a disinterested Board of Directors of the Corporation, his six co-plaintiffs, and substantially all of the other stockholders ***. That position certainly cannot oust the court of its jurisdiction to pass upon and approve a fair and non-collusive compromise and to terminate a protracted and expensive litigation. And his consent as a stockholder to that kind of a compromise is no more essential to the court's power to approve than his consent as a plaintiff."

Significantly, the power of the courts to settle representative actions without the approval of the plaintiffs has been recognized, as well, in class action cases. *Flinn* v. *F.M.C. Corp.*, 528 Fed. 2d 1169 (4th Circuit, 1975); *Purcell* v. *Keane*, 54 F.R.D. 455 (E.D. Pa. 1972); *Pettway* v. *American Cast Iron Pipe Co.*, 576 Fed. 2d 1157 (5th Circuit, 1978); *Officers for Justice* v. *Civil Service Commission*, 688 Fed. 2d 615 (9th Circuit, 1982).

It is respondent's position on this application, that the procedure utilized by the trial court was reasonable and judicious under all of the circumstances of the case, and that the propriety of that procedure has been affirmed by the Appellate Court, whose decision and order the state's highest court has refused to review. The petitioner's argument that the trial court had no power to settle this action has already been answered by the state appellate process which has been exhausted herein.

Petitioner's obvious dislike of the state procedure provided by Section 115-A of the Partnership Law does not establish a "due process" violation. There is nothing in the procedure used by the state courts which "so shocks the conscience" as to establish a constitutional violation. The state not only provided the judicial vehicle for assertion of the partnerships' rights, but provided for an extensive discovery procedure which was utilized by plaintiff for over nine (9) years, and permitted the plaintiff some fifty-five (55) days to prove his direct case. As respondent's "statement of the case" shows, not only did the trial court conclude that the defendants offer of settlement was fair and adequate, but Steven Hochhauser, who had represented the petitioner for approximately ten (10) years, concluded that the petitioner's personal interest prevented him from adequately representing his wards, and recommended settlement on the defendant's terms.

Petitioner's disagreement with the procedure followed and approved by the state courts would seem to be irrelevant. As this Court said in *Breithaupt* v. *Abram*, 352 U.S. 432, 77 S. Ct. 408 (1957):

> "* * * Furthermore, due process is not measured by the yardstick of personal reaction or sphygmogram of

> the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process.***"

It is submitted that the record in this case demonstrates clearly that the community sense of "decency and fairness" has been adequately satisfied by the state courts, and that petitioner's due process claim is unfounded.

CONCLUSION

The petitioner's application of a Writ of Certiorari to the Appellate Division of the New York State Supreme Court should be denied.

Dated: Garden City, New York
February 22, 1990

Respectfully submitted,

LYNN, LEDWITH & CORCORAN
Attorneys for Respondents Robert J. Reed, Sidney Hackell, and Citibank N.A. (formerly First National City Bank), individually and as Executors of the Last Will and Testament of Simon Cohen deceased, William B.F. Werner, individually and doing business as Mid-Island Hospital, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate & Management Co., Simon Cohen Realty Co. and Aljer Realty Co.
200 Garden City Plaza
P.O. Box 976
Garden City, N.Y. 11530
(516) 742-6200